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No. 03-1159

In the Supreme Court of the United States

STATIA A. SKWIRA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EDWARD S. SKWIRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that, under the statute of limitations provision of the Federal Tort Claims Act, a wrongful-death claim involving an intentional killing by a government employee accrued when the plaintiff knew or had reason to know of (1) the fact of the injury and (2) the injury's causal connection with the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A47) is reported at 344 F.3d 64. The opinion of the district court (Pet. App. A50-A93) is reported at 204 F. Supp. 2d 216.

JURISDICTION

The judgment of the court of appeals (Pet. App. A94) was entered on September 15, 2003. A petition for rehearing was denied on November 13, 2003 (Pet. App. A95-A96). The petition for a writ of certiorari was filed on February 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are members of the family of Edward A. Skwira, one of several patients who, while being treated at the Veterans Affairs Medical Center (VAMC) in Leeds, Massachusetts, died as a result of an injection of epinephrine administered by Kristen Gilbert, a nurse who worked on Ward C of the hospital.

a. On February 15, 1996, Mr. Skwira was transferred to the VAMC from another facility for continued treatment of alcoholism. That same day, Mr. Skwira had what was believed to be a cardiac event. On February 18, 1996, he died. His death certificate identified the causes of death as "dissecting aneurysm," "inferior wall myocardial infarction," "arrhythmia," and "chronic alcoholism." Pet. App. A3, A28; Pet. C.A. App. 115.

A criminal investigation into the deaths of Mr. Skwira and other patients who died on Ward C of the VAMC during the same period commenced in the spring of 1996. Pet. App. A3. The lead investigators were Assistant United States Attorney (AUSA) William Welch, Veterans Administration Special Agent Steven Plante, and Massachusetts State Police Trooper Kevin Murphy. *Id.* at A55. Beginning in the fall of 1996, these men approached families of patients who had died on Ward C between the fall of 1995 and the winter of 1996 under suspicious circumstances, and asked permission to exhume the bodies of the deceased and perform autopsies. *Id.* at A4. The first family approached was that of Mr. Skwira, whose body was subsequently exhumed and examined. *Ibid.* By the time of the exhumation, Gilbert had become the focus of the investigation and that fact had become public. *Id.* at A3-A4.

As petitioners acknowledge, "[i]n the summer of 1996, articles started to appear in local newspapers describing an inquiry into suspicious deaths at the VAMC." Pet. 3. Media coverage was extensive. For example, an article entitled "VA officials probe deaths" in the July 17, 1996, edition of *The Daily Hampshire Gazette* reported that "[a] federal probe into 'a higher than usual number of deaths' from cardiac arrest on one ward of the U.S. Department of Veterans Affairs Medical Center has the hospital's acting director 'anxious' for a resolution." Pet. App. A3, A55; Pet. C.A. App. 59. It noted that the acting director had not ruled out either "foul play or malpractice." Pet. App. A3; Pet. C.A. App. 60. An August 2, 1996, article in the same newspaper, which ran under the headline "VA nurse said a focus of probe," reported that, while the nurse had not been charged with a crime, she had been placed on leave "at about the same time that the VA's Office of Inspector General was called in to investigate what officials feared was a greater number of deaths due to cardiac arrest occurring on a particular ward during a particular shift than on others." Pet. App. A3-A4, A55-A56; Pet. C.A. App. 62.

After the United States Attorney's Office issued a press release in early August 1996 stating that a grand jury investigation was in progress, there was again a flood of publicity. Pet. App. A4, A29. The August 8, 1996, edition of *The Daily Hampshire Gazette*, for example, ran an article with the title "Federal grand jury involved." Pet. App. A56; Pet. C.A. App. 65. It reported that the investigation into the deaths at the VAMC "is being broadened and a grand jury able to hand down indictments is hearing evidence." Pet. C.A. App. 65. The article also stated that "local law enforcement officials were asked to participate in the investi-

gation based on their expertise, especially in homicide cases." *Ibid.*

Mr. Skwira's family was "surprised that Edward had died of heart complications at the VAMC when he was not admitted for heart problems." Pet. App. A86; accord *id.* at A24-A25. Then, in the summer of 1996, Mr. Skwira's daughter, Marsha Yarrows, began reading newspaper accounts of the ongoing investigation. *Id.* at A25, A86. She testified that, after reading these stories, "it was like a lightbulb went off because I knew that was exactly what had happened to my father." *Id.* at A25. "[I]t really bothered me," she said, "and even though my father's name wasn't mentioned as being one of the people who was investigated, I knew right then and there that that was exactly what had happened to him, that he was one of those people that they must be investigating the death of." *Ibid.*

In October 1996, Gilbert was arrested and charged with phoning bomb threats into the VAMC. Pet. App. A5. Her name was made public in connection with the arrest, and she was identified by the local media as the subject of the ongoing investigation into the deaths at the VAMC. *Id.* at A5, A29, A42 n.4.

b. In November 1996, a day after Mr. Skwira's autopsy, AUSA Welch informed his family that "the death certificate as printed was incorrect," and that Mr. Skwira "didn't die of a heart attack." Pet. App. A5, A29. The family was also told that "our medical people had some concerns that perhaps Mr. Skwira did not die of natural causes." *Id.* at A86.

In a July 1997 meeting with AUSA Welch, Mr. Skwira's widow was told that the chemical ketamine had inexplicably been found in her husband's body. Pet. App. A5, A29. He advised Mrs. Skwira that "the presence of the ketamine was a surprise," and that "the

medical records * * * had not revealed the administration of it in an authorized fashion." Pet. C.A. App. 135a-136. Welch explained that further investigation was necessary to determine if the ketamine had been lawfully administered. Pet. App. A5; Pet. C.A. App. 136.

c. On June 8, 1998, AUSA Welch and Trooper Murphy met with members of the Skwira family and informed them that toxicological tests had conclusively determined that Mr. Skwira had died of epinephrine poisoning. They expressed the belief that Mr. Skwira had been murdered by Gilbert and told the family that they would be seeking an indictment. Pet. App. A6, A29.

In the fall of 1998, Gilbert was charged with first-degree murder and assault with the intent to commit murder. On March 14, 2001, she was convicted of three counts of murder and other charges. She was sentenced to life in prison. Pet. App. A6, A29, A58-A59.

2. In October 1999, the Skwira family filed an administrative tort claim with the Veterans Administration. In October 2000, after the administrative claim had been denied, petitioners filed a Federal Tort Claims Act (FTCA) action against the United States in district court. Their complaint principally alleged negligent supervision, and it sought damages for, among other things, wrongful death. The district court consolidated petitioners' action with FTCA suits brought by five other families of Gilbert's alleged victims. Pet. App. A2, A7, A29, A43 n.7.

Arguing that the administrative claims were untimely, the government filed a motion to dismiss. Pet. App. A2. It relied on the statute of limitations provision of the FTCA, 28 U.S.C. 2401(b), which states, in relevant part, that "[a] tort claim against the United

States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues."

The district court granted the motion as to five of the suits (Pet. App. A50-A93), including petitioners' (*id.* at A85-A89). Applying the principle that the FTCA claims accrued when the plaintiffs "had both knowledge of their injuries and sufficient indication of the injuries' cause" (*id.* at A65), the court held that petitioners' claim accrued no later than November 1996, by which time they knew that Mr. Skwira "did not die as the VAMC said he did" and that "there was an investigation targeting a VAMC nurse over the unusually high number of cardiac related deaths." *Id.* at A89. Because petitioners' administrative claim was filed nearly three years after November 1996, it was nearly a year too late.

3. Petitioners appealed the dismissal of their FTCA suit, and a divided panel of the court of appeals affirmed. Pet. App. A1-A47.

a. The majority observed that, while the "general rule" under the FTCA is that "a tort claim accrues at the time of the plaintiff's injury," this Court recognized in *United States* v. *Kubrick*, 444 U.S. 111 (1979), that a "discovery rule" applies to claims of medical malpractice. Pet. App. A12 (quoting *Atallah* v. *United States*, 955 F.2d 776, 779 (1st Cir. 1991)). Under the latter rule, the majority explained, "a claim 'accrues' when an injured party 'knows both the existence and the cause of his injury.'" *Ibid.* (quoting *Kubrick*, 444 U.S. at 113). Rejecting the government's argument that a discovery rule should apply only to medical-malpractice suits and that "a strict time-of-injury rule" should apply to a wrongful-death action like this one (*id.* at A14), the majority noted that "versions of *Kubrick*'s discovery

rule" had been applied "in settings other than medical malpractice" (*id.* at A13) and determined that a discovery rule should be applied "to this wrongful death action" (*id.* at A14-A15).

The majority then addressed "the nature of that discovery rule." Pet. App. A15. Relying, in part, on decisions of the Eighth and Eleventh Circuits (*id.* at A18-A20), the majority held that, "outside the medical malpractice context, a claim accrues under the FTCA once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury." *Id.* at A21. Applying that discovery rule, the court concluded that petitioners' administrative claim accrued no later than November 1996. *Id.* at A23-A27. By that time, the majority explained, "the Skwira family was aware of press reports concerning the suspicious deaths on Ward C; they knew that the government had begun a criminal investigation into Skwira's death; and they knew that the cause of death printed on Skwira's death certificate was incorrect." *Id.* at A26. The majority also determined that "[t]he family's subjective beliefs, described in deposition and trial testimony, reinforce[] the correctness of this conclusion." *Id.* at A24.

b. Chief Judge Boudin filed a concurring opinion. Pet. App. A30-A34. He observed that, although "[t]he formulas used in the cases for implementing the discovery rule are neither precise nor consistent," the ultimate question, which is "highly dependent on the facts," is "whether the plaintiff knew enough as to the potential responsibility of the defendant that—within two years of that point—he should have filed the short form" setting forth an administrative claim. *Id.* at A31.

Applying that principle to the undisputed facts of this case, Chief Judge Boudin concluded that, by mid-1996, "a reasonable person would have believed that some kind of negligence or misconduct by government employees at the hospital *might well* underlie Edward Skwira's death." *Id.* at A32.

c. Judge Torruella filed a dissenting opinion. Pet. App. A34-A42, A46-A47. He disagreed with the standard adopted by the majority, because in his view the correct standard requires that, "before a statute of limitations runs on an FTCA claim, a plaintiff must be aware both of the existence of his injury *and* 'the facts of causation.'" *Id.* at A34 (quoting *Kubrick*, 444 U.S. at 122). Judge Torruella thought petitioners' suit was timely because they "could not possibly have discovered the medical cause of Edward Skwira's death before June 8, 1998," the date on which "the government first informed [them] about 'the facts of causation.'" *Ibid.*

ARGUMENT

Petitioners contend that, by virtue of the discovery rule it applied, the court of appeals' decision conflicts with this Court's decision in *United States* v. *Kubrick*, 444 U.S. 111 (1979). Pet. 14-21. They contend that, for the same reason, the court of appeals' decision conflicts with prior decisions of the First Circuit and decisions of other courts of appeals. Pet. 21-25. And they contend that, even under the discovery rule applied by the court of appeals, their claim was timely filed. Pet. 25-30. Because each of these contentions is without merit, and because the result in this case would likely be the same under petitioners' formulation of the discovery rule, review by this Court is unwarranted.

1. The court of appeals held that petitioners' claim accrued when they knew, or in the exercise of reasonable diligence should have known, (1) of the injury and (2) of sufficient facts to permit a reasonable person to believe that "there is a causal connection between the government and [the] injury." Pet. App. A21. Petitioners contend (Pet. 14-21) that that holding is inconsistent with *Kubrick*, which applied the principle that a medical-malpractice claim accrues when the plaintiff knows, or should know, both the existence and the cause of his injury. The court of appeals' decision conflicts with *Kubrick*, according to petitioners, because "cause," as used in that case, is the "*medical* cause," which petitioners take to mean the precise medical mechanism by which an injury occurred, not "a suspicion that a government employee was responsible for the death." Pet. 14-15. There is no such conflict.

a. As an initial matter, petitioners are mistaken in their contention that *Kubrick* "holds" (Pet. 14) that a claim accrues when the plaintiff knows, or should know, of the existence and cause of his injury. The holding of *Kubrick* was that a claim can accrue even if the plaintiff does not know, or have reason to know, that the injury was negligently inflicted. 444 U.S. at 118-125. The Court "simply observed (without endorsement) that several Courts of Appeals had substituted injury-discovery for the traditional rule [of accrual] in medical-malpractice actions under the [FTCA]." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 37 n.2 (2001) (Scalia, J., concurring in the judgment). See *Kubrick*, 444 U.S. at 120-121 & n.7.

Nor does *Kubrick* "hold," or even state, that the cause of an injury, under the discovery rule applied by those courts of appeals, is its "medical" cause. To the contrary, there is language in the opinion suggesting

that causation in that context has the same meaning it was given by the court of appeals here. See 444 U.S. at 122 ("The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.").

b. Even if *Kubrick* could be thought to "hold" that a discovery rule is applicable to medical-malpractice claims under the FTCA, and that causation in that context means "medical" causation, there would still be no conflict between that case and the decision below. The court of appeals correctly recognized that *Kubrick* involved "the context of medical malpractice claims" (Pet. App. A12), and that the discovery rule as employed in this case applies "outside the medical malpractice context" (*id.* at A19, A21). This Court has never suggested, either in *Kubrick* or in any decision since, that the discovery rule as it has been applied in medical-malpractice cases must be applied in the identical manner outside the context of medical malpractice. Indeed, the Court has never suggested that *any* discovery rule is applicable in FTCA cases that do not involve medical malpractice—a type of claim, as the Court recently made clear, where "the cry for a discovery rule is loudest." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000).

The Court recognized in *Kubrick* itself that the "general rule" under the FTCA is that "a tort claim accrues at the time of the plaintiff's injury" (444 U.S. at 120), and the Court's discussion of the FTCA's legislative history in *Kubrick* suggested that that general rule might apply to a claim of wrongful death (*id.* at 119 n.6). The court of appeals rejected the government's position that the time-of-injury rule applies in a case of this type, and applied a discovery rule instead. Pet. App. A13-A15. But nothing in *Kubrick* or any other decision

of this Court obligated the court of appeals to apply the discovery rule in precisely the same manner as it has been applied to claims of medical malpractice.

c. The court of appeals reasonably determined that "this case is not 'functionally identical' to a medical malpractice case" and that a "medical causation" discovery rule is therefore inappropriate. Pet. App. A45 n.14. Contrary to petitioners' contention that there is no difference between a medical-malpractice claim and the type of wrongful-death claim at issue here (Pet. 15-16), there are at least two crucial differences between them that justify the court of appeals' conclusion that the discovery rule must be applied in a slightly different manner in this context.

First, unlike *Kubrick*, this case involves an allegation of negligent supervision of a government employee who carried out an intentional killing. See Pet. App. A45 n.14. Thus, the crucial causation issue is the fact of the intentional killing by a government emplovee, not the precise medical mechanism by which the killing took place. Whatever the meaning of "probable cause" in the medical-malpractice context, it seems obvious that a plaintiff is on notice of the probable cause of a murder victim's death when there is reason to suspect both the fact of murder and the identity of the murderer.

The rule proposed by petitioners, by contrast, would lead to absurd results. If a claim of negligent supervision of a government employee who carried out an intentional killing did not accrue until the plaintiff knew, or had reason to know, of both the injury and its "medical" cause, a plaintiff who knew that her husband had been murdered by a government employee, and also had reason to believe that the employee was negligently supervised, would presumably be able to delay filing an administrative claim until she knew, or had

reason to know, the specific mechanism by which the murder was carried out. A discovery rule that would lead to such a result makes little sense and would unfairly favor plaintiffs.

Second, in a medical-malpractice case, "knowledge of the federal status of the malpractitioner is irrelevant for accrual purposes," because the identity of the treating physician is usually known to the patient. Pet. App. A17, A45 n.14. But in a wrongful-death case like this one, the identity of the killer is less likely to be known to the plaintiff. A discovery rule under which a claim would accrue even if the plaintiff did not know or have reason to know that the injury had been caused by an agent of the government would thus unfairly favor the government.

2. Petitioners also contend (Pet. 21-25) that the court of appeals' decision conflicts with other decisions of the First Circuit and with decisions of other courts of appeals. Petitioners are mistaken on both counts.

a. According to petitioners (Pet. 21-23), the decision below conflicts with three prior First Circuit decisions that, petitioners say, "uniformly applied the *Kubrick* accrual standard" (Pet. 21). Since this Court does not grant certiorari to resolve intra-circuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), that contention is irrelevant. It is also incorrect. Two of the cases cited by petitioners—*Nicolazzo* v. *United States*, 786 F.2d 454 (1st Cir. 1986), and *Gonzalez* v. *United States*, 284 F.3d 281 (1st Cir. 2002)—involved medical-malpractice claims. The decision below does not conflict with those decisions for the same reason it does not conflict with *Kubrick*. The third case cited by petitioners—*Attallah* v. *United States*, 955 F.2d 776 (1st Cir. 1992), which involved the robbery and murder of the plaintiffs' courier by Cus-

toms agents—also differs from this case, in that it is not a wrongful-death case. As the court below explained (Pet. App. A22-A23), moreover, *Attallah* is consistent with the decision here because it held that the plaintiffs' loss-of-property claim did not accrue during the time they "did not know, [and] in the exercise of reasonable diligence could [not] have known, *of the Customs agents' criminal acts*" (955 F.2d at 780 (emphasis added)), but did accrue once they were on notice of those facts.

b. Petitioners also contend that the court of appeals' decision conflicts with cases with "factual scenarios *similar or analogous* to this one," where other circuits "have applied the *Kubrick* standard to delay accrual until it can fairly be held that knowledge of the cause of the injury is obtained." Pet. 23. Petitioners contend, in particular, that the decision below "directly conflicts" (Pet. 24) with decisions of the Second, Seventh, and Eighth Circuits. See Pet. 24-25. Petitioners are mistaken.

Unlike this case, the Seventh and Eighth Circuit cases cited by petitioners—*Stoleson* v. *United States*, 629 F.2d 1265 (7th Cir. 1980), and *Osborn* v. *United States*, 918 F.2d 724 (8th Cir. 1990)—are not wrongful-death cases involving an intentional killing by a government employee. *Stoleson* involved exposure to a harmful substance in the workplace, and *Osborn*, like *Kubrick*, involved a claim of medical malpractice. The Second Circuit case cited by petitioners—*Barrett* v. *United States*, 689 F.2d 324 (1982), cert. denied, 462 U.S. 1131 (1983), which involved the death of a subject of a secret Army chemical-warfare experiment—*was* a wrongful-death case that is arguably analogous to this one, but it is not inconsistent with the decision below. In *Barrett*, as in this case, the court's discussion of the

"causation" element focused principally on when the plaintiff knew or should have known that one or more agents of the government were responsible for the death. See 689 F.2d at 328-330.

3. Petitioners also contend (Pet. 25-30) that, even if the discovery rule applied by the court of appeals is correct, their claim was timely filed. Review of that claim is unwarranted, because it alleges only "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Review is also unwarranted because the claim is without merit. The court of appeals correctly held (Pet. App. A23-A27) that petitioners were on inquiry notice of an injury caused by an agent of the government no later than November 1996. By that time, petitioners knew that there was a criminal investigation of a government-employed nurse in connection with the deaths on Ward C of the VAMC and that the causes of death listed on Mr. Skwira's death certificate were inaccurate. *Id.* at A24-A26.

In support of their contention that their claim was timely, petitioners argue that, up until November 1996, they "had been given highly equivocal information by the government investigators which expressly did not rule out death by natural causes," and that, "[u]ntil [they] knew that Edward Skwira had been poisoned and that he did not die of natural causes, they could not know, except by pure speculation, that he suffered injury caused by a government employee." Pet. 26-27. This argument seems to rest on the premise that accrual requires actual knowledge of all the relevant facts. Such a premise is categorically incorrect. As even the dissenting judge recognized, under a discovery rule a claim accrues when, "in the exercise of due diligence," the plaintiff "should have known" the crucial facts, whether or not he did in fact know them.

Pet. App. A36 (quoting *Gould* v. *HHS*, 905 F.2d 738, 742 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991)). Indeed, petitioners themselves acknowledge as much elsewhere in their petition. Pet. 27.

Petitioners also contend that "[t]he 'fact of injury' must mean the fact of tortious injury," and that "there can be no 'causal connection to the government' until it is known that the injury was tortiously caused." Pet. 29. But equating "injury" with "tortious injury" is flatly inconsistent with the holding of *Kubrick*, which is that accrual of a claim does not require "awareness by the plaintiff that his injury was negligently inflicted." 444 U.S. at 123. In any event, when, as here, the injury involves a murder, a plaintiff is not likely to need more information before he has reason to believe the injury is tortious.

4. While petitioners' administrative claim was clearly untimely under the discovery rule as applied by the court of appeals, the result in this case would likely be the same under any application of the discovery rule, including the approach that petitioners advocate. In November 1996, by which time they were aware that the deaths at the VAMC were being investigated and that Mr. Skwira's death certificate was inaccurate, petitioners, like the plaintiff in *Kubrick*, had enough information to protect themselves "by seeking advice in the medical and legal community." *Kubrick*, 444 U.S. at 123. Indeed, this case can appropriately be viewed as one not only of constructive knowledge but of actual knowledge, since Mr. Skwira's daughter, petitioner Marsha Yarrows, testified that, after she began reading newspaper articles in the summer of 1996, "it was like a lightbulb went off" and she "knew right then and there * * * exactly what had happened to [her father]." Pet. App. A25. The dissenting judge thought it improper to

rely on what petitioners "subjectively knew" (*id.* at A47 n.23), but he was mistaken in that belief. Because, under a discovery rule, a cause of action accrues when the relevant facts either were known to the plaintiff or, in the exercise of reasonable diligence, should have been known, actual knowledge is a sufficient condition for accrual.

The same result under a slightly different formulation of the discovery rule was precisely the outcome in the district court. While the district court agreed with petitioners that this case was "functionally identical to a malpractice case," and that their claim accrued when "they had both knowledge of their injuries and sufficient indication of the injuries' cause" (Pet. App. A65), it still determined that the claim was untimely (*id.* at A85-A89). In his concurring opinion in the court of appeals, moreover, Chief Judge Boudin suggested that petitioners' claim was untimely regardless of the exact manner in which the discovery rule was formulated. He framed the ultimate question in more general terms: whether, taking into account all the facts of the case, "the plaintiff knew enough as to the potential responsibility of the defendant that—within two years of that point—he should have filed the short form appri[s]ing the government of a potential claim against it." *Id.* at A31. On the basis of the record in this case, Chief Judge Boudin correctly concluded that, by mid-1996, "a reasonable person would have believed that some kind of negligence or misconduct by government employees at the hospital *might well* underlie Edward Skwira's death." *Id.* at A32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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